IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 604.

DIVISION 1287 of the AMALGAMATED ASSOCIATION of STREET, ELECTRIC RAILWAY and MOTOR COACH EMPLOYEES of AMERICA et al.,
Appellants,

vs.

STATE OF MISSOURI,
Appellee.

On Appeal from the Supreme Court of Missouri.

BRIEF OF KANSAS CITY POWER & LIGHT COMPANY, AMICUS CURIAE.

Irvin Faris,
Harry L. Browne,
Howard F. Sachs,
1000 Power & Light Building,
Kansas City, Missouri,
Attorneys for Amicus Curiae.

R. L. Stevenson, Inc., 1300 Oak Street, Kansas City 6, Mo., HArrison 1-0207

INDEX

Cases Cited

OTHER AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 604.

DIVISION 1287 of the AMALGAMATED ASSOCIATION of STREET, ELECTRIC RAILWAY and MOTOR COACH EMPLOYEES of AMERICA et al.,
Appellants,

vs.

STATE OF MISSOURI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI.

BRIEF OF KANSAS CITY POWER & LIGHT COMPANY, AMICUS CURIAE.

INTEREST OF AMICUS CURIAE.

This brief is filed by Kansas City Power & Light Company, *amicus curiae*, with the written consent of the parties, obtained and filed pursuant to Rule 42 of this Court.

The interest of Kansas City Power & Light Company in this case arises from the fact that it is a public utility operating in the State of Missouri and obligated by the Public Service Commission Act of said State (Chapter 386, RSMo 1959) to render continuous safe and adequate electrical service to the public in Kansas City, Missouri, and in other parts of the State. The Company operations are governed by the provisions of the act which is challenged in this proceeding (Chapter 295, RSMo 1959), commonly known as the King-Thompson Act, which was enacted to protect the people of Missouri from threatened interruptions in the service of public utilities.

In addition to its general interest in this legislation, arising from its duty to provide continuous service to the public, Kansas City Power & Light Company is interested as a party having had direct experience under the act. The Company was seized, pursuant to the provisions of the King-Thompson Act, in 1956 and again in 1957, when the Governor of Missouri determined that labor disputes between the Company and its employees threatened to interrupt the operations of the Company and to disrupt electrical service to the public.

ARGUMENT.

I. Appellate Review of the Validity of the Injunction Below Cannot Be Had, When the Case Has Become Moot by Expiration of the Injunction.

Once again, parties challenging the validity of the King-Thompson Act are insisting on review of a moot case. The point herewith presented is precisely the same as that which *amicus curiae* presented in prior litigation in this Court, and which served as the basis for decision. *Local*

8-6 Oil, Chemical & Atomic Workers Union v. *Missouri*, 361 U.S. 363.

The temporary restraint of State seizure (and an injunction persisting for the term of such seizure) has now been lifted; and appellants are free to strike against the transit company in Kansas City. As in the prior case, the Court is bound to declare (l.c. 371):

> "The decision we are asked to review upheld only the validity of an injunction, an injunction that expired by its own terms . . . Any judgment of ours at this late date 'would be wholly ineffectual for want of a subject-matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. . . .'"

Equally applicable is the statement of the Court (l.c. 367):

> "Because that injunction has long since 'expired by its own terms' we cannot escape the conclusion that there remain for this Court no 'actual matters in controversy essential to the decision of the particular case before it.'"

The present argument of appellants has been heard before, and rejected by this Court. It was not a new theme when the *Local 8-6* case was decided. As restated by the Court (l.c. 368):

> ". . . it was urged (in prior litigation) that the controversy was not moot because of the continuing threat of state seizure in future labor disputes. It was argued that the State's abandonment of alleged unconstitutional activity after its objective had been accomplished should not be permitted to forestall decision as to the validity of the statute under which the State had purported to act. . . . In finding that the con-

troversy was moot, the Court necessarily rejected all these contentions."

Factual differences between *Local 8-6* and the instant case offer no basis for avoiding the result there reached. In the present case, there has been no contractual settlement, as occurred in *Local 8-6*, but the restraint imposed by law has terminated just as surely as in that case. In *Local 8-6*, the Court relied on the comment of the Supreme Court of Missouri to the effect that, when the Governor terminated seizure, the injunction " 'expired by its own terms' " (l.c. 366). In the case at bar, the Supreme Court of Missouri anticipated the possible end of seizure, and declared, "any such release would relieve appellants from the particular judgment entered in this case." *State* v. *Division 1287, Amalgamated Association of Street, Electric Railway, and Motor Coach Employees of America*, 361 S.W.2d 33, 49. The State of Missouri has advised the Circuit Court of its view that, upon the release of the premises from seizure, there would be "no basis for restraint against the Union." (See letter of J. Gordon Siddens, Assistant Attorney General, to counsel and Circuit Judge Murphy, dated January 8, 1963, dispatched to the Clerk of this Court on said date.) Union officials have concurred in the view that no further action is needed to terminate the injunctive restraint. For example, see the lead article in *The Kansas City News-Press* of March 8, 1963, headed "Transit Tie Could Come 'Any Time'," a copy of which is reprinted as an appendix to this brief.

The mere fact that the restraint now under review ended three months rather than three years before submission of this case to the Court would not distinguish *Local 8-6* from the case at bar. Mootness occurring pending appeal, whenever noted, precludes decision on the merits of the former controversy. *Atherton Mills* v. *John-*

ston, 259 U.S. 13; *Bank of Iron Gate* v. *Brady*, 184 U.S. 665.

There is no substantial difference between the termination of a challenged restraint by reason of settlement of the economic dispute and by reason of executive decision that restraint is no longer authorized under Missouri law, as interpreted by the Missouri Supreme Court. Mootness is not a penalty imposed on a party because he has voluntarily acted in a manner which estops him from contending there is a controversy; it is simply the result of a determination that the controversy (in this case the restraint) has ceased. Factors beyond the control of a party can moot his case, as in the decisions above cited, where death and coming of age terminated appeals.

Nor is there authority for reclassifying a dead case because the appellee had a hand in its death. Appellants do not establish that the decision of the Missouri Supreme Court or the action of the Governor were made in bad faith. Appellants' suggestion that "nothing accounts for (the vacation of seizure) but the appeal" (Brief, page 23) conveniently forgets the Governor's duty to follow the direction set by the Missouri Supreme Court. The timing of the proclamation, three days after Christmas, was appropriate in its own right. It is unsound as well as ungenerous for appellants to suggest that this Court's docket was a factor in the Governor's decision. The controlling considerations appear to have been the public convenience and the opinion of the Missouri Supreme Court.

Even if one should disagree with the interpretation of the Missouri law expressed in the opinion below, an artificially restricted construction of such law would of course be proper to avoid constitutional issues. It would have mooted this appeal if the Missouri Supreme Court

had held that no transit strike in Kansas City can create an emergency such as will warrant State seizure, yet appellants would hardly be in a position to carry on their attack against this law. Under the actual decision of the Missouri Supreme Court, and the later action of the Governor, it may hereafter be difficult to convince Circuit Courts in the State that sufficient emergencies exist to justify seizures and injunctions in transit strikes. In fact, the Missouri Supreme Court's repeated references to "reasonable notice to the public" of a prospective transit strike as a test of emergency under the King-Thompson Act (361 S.W.2d 33, 50), renders doubtful the future practical applicability of the act to the transit industry. There is reasonable doubt that appellants will find the act successfully invoked in future transit strikes. Appellants' present interest in the validity of this legislation is moot, and their future interest is hypothetical and uncertain, in light of the decision of the Missouri Supreme Court.

Appellants assume they will be subjected to future restrictions, and make an emotional appeal based on past difficulties in obtaining this Court's ruling on the validity of the legislation in question. Note, however, that a comparable test of an injunction against a strike allegedly imperiling the "national safety" was processed from the filing of the complaint through the issuance of a decision by the United States Supreme Court in a total of eighteen days. *United Steelworkers of America* v. *United States*, 361 U.S. 39, 45. Moreover, if a test case based on an injunction were the only method of obtaining a determination of the validity of this legislation, and if such a test would likely become moot prior to the exhaustion of judicial proceedings, appellants can command no more sympathy than can those who would challenge other practices by governmental bodies, when there are no parties pos-

sessed of a justiciable controversy to sustain litigation. For example, note the practices mentioned by Mr. Justice Douglas in *Engel* v. *Vitale*, 370 U.S. 421, 437, note 1, 439-442, many of which, if unconstitutional, are nevertheless beyond the reach of judicial power. It is respectfully submitted that the Court should adhere to its past decisions and resist temptation to use a moot case as a means for re-examining the delicate balance between State and Federal power, where labor relations and local responsibilities are inextricably intermingled.

II. The King-Thompson Seizure—Injunction Procedure Is a Valid Exercise of the State's Police Powers, Not Inconsistent with Federal Legislation.

In the following discussion, amicus reprints for the convenience of the Court, major portions of its amicus brief (pages 10-20) filed in the *Local 8-6* case, No. 42, October Term, 1959. Modification of the argument has been made to give the discussion current applicability.

A. The Amalgamated Decision Does Not Require a Pre-emption Ruling in This Case.

Appellants contend that this case is controlled by *Amalgamated Ass'n* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, which invalidated the Public Utility Anti-Strike Law of Wisconsin, in litigation involving a perpetual injunction and fines imposed for contempt of court. The opinions of the Missouri Supreme Court provide a closely-reasoned answer to appellants' contention, and if elaboration is desirable, undoubtedly the State will supply it. Summarily, it may be stated that there is nothing in the federal legislation or in the decisions of this Court which would establish an unconditional right to strike, regardless of the consequences and circumstances,

and that recognized restrictions on the right, established by local law and consistent with federal law, could be applied by analogy to sustain the King-Thompson Act.

The majority opinion of Mr. Chief Justice Vinson in the *Amalgamated* decision, *supra*, clearly anticipated a distinction which is here urged, when he stated (l.c. 393-394), "the Wisconsin Act before us is not 'emergency' legislation . . . Far from being limited to 'local emergencies,' the act has been applied to dispute national in scope, and application of the act does not require the existence of an 'emergency.'" In footnote 19, the Chief Justice continued (l.c. 394), "Far from being legislation aimed at 'emergencies,' the Wisconsin Act has been invoked to avert a threatened strike of clerical workers of a utility (citation)." The majority opinion was also careful to point out (l.c. 398-399) the inconsistency between the federal duty to continue collective bargaining and the state invocation of compulsory arbitration to resolve an "impasse." It would not be safe to assume, as appellants do, that these considerations, entering into the majority opinion in *Amalgamated*, and absent in the present case, were not decisive in the thinking of those who who constituted the majority of the Court in 1951. It is entirely consistent to concur in the *Amalgamated* decision and to sustain the King-Thompson Act.

Powerful support has been given by subsequent decisions of this Court to an interpretation of the *Amalgamated* decision which would limit its application to instances which are clearly inconsistent with federal labor legislation, and which would permit legislation of the type enacted by the State of Missouri. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. The decision itself merely held that a State court could not award dam-

ages for picketing which it could not enjoin. As noted in the concurring opinion, however (l.c. 250), the majority took the occasion to make a declaration of law which "will stand as a landmark in future 'pre-emption' cases in the labor field."

The majority opinion of Mr. Justice Frankfurter repeats prior declarations of the Court that (l.c. 240) ". . . the Labor-Management Relations Act 'leaves much to the states, though Congress had refrained from telling us how much . . .'" The majority opinion further states (l.c. 243-244) "due regard for the presuppositions of our embracing federal system . . . has required us not to find withdrawal from the states of power to regulate . . . where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the States of the power to act." A similar thought is developed further in the *Garmon* opinion, where Mr. Justice Frankfurter states (l.c. 247), ". . . the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed Congressional direction."

The author of the *Garmon* opinion, whom we may now speak of as one of the great figures in the history of this Court, was very clearly recognizing local authority over both "violence" and *other* "imminent threats to the public order," (l.c. 247) such as are likely in an emergency situation arising during a strike in a public utility. This is apparent in Mr. Justice Frankfurter's use of reasoning almost identical to that in *Garmon* in his minority opinion dealing with the State of Wisconsin's Public Utility Anti-Strike Law, where he stated: "Due regard for the basic elements

in our federal system makes it appropriate that Congress be explicit if its desires to remove from the orbit of State regulation matters of such intimate concern to a locality as the continued maintenance of services on which the decent life of a modern community rests . . . I find no indication in the (federal) statute that the States are not equally free to protect the public interest in State emergencies." *Amalgamated Ass'n* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 403-404, 409. It would appear from *Garmon* that the majority of the Court is prepared to accept at least this much of the reasoning expressed by Mr. Justice Frankfurter in his dissent in the *Amalgamated* case. The *Garmon* decision is authority for the proposition that the States may exercise the police powers where there are "imminent threats to the public order" and "compelling state interest . . . in the maintenance of domestic peace." It is difficult to imagine stronger cases than those covered by the King-Thompson Act, where situations are dealt with which are "deeply rooted in local feeling and responsibility," and which therefore resist application of a doctrine resulting in local disability.

It may perhaps be argued from the ruling in *Garmon* that the Labor Board should have primary jurisdiction to determine whether strikes in public utilities create local emergencies and, if so, whether they are nevertheless protected by the federal law. This would, however, be a perversion of the *Garmon* decision, where, as in an economic strike against a public utility, there is no arguable basis for filing an unfair labor practice charge, and thus no statutory method of reaching the Board for decision. It would be patently unsound to concede on the one hand that Congress left the States free to deal with local emergencies, but to hold on the other hand that the determination of whether or not there was such an

emergency must be withheld in deference to the expertise of the Labor Board, when Congress has failed to provide a statutory method by which that expertise could be exercised.

It thus appears, from the most recent "landmark" decision of this Court, as well as from the reasons developed prior thereto, that the *Amalgamated* decision is not so far-reaching as to require the invalidation of the King-Thompson Act, and that the act is a proper exercise of the State's police powers, and is not affected by federal legislation.

B. Legislative History Favors Validity of the King-Thompson Act.

Appellants argue that Congress has "ratified" the "rule" in the *Amalgamated* decision (Brief for Appellants, pages 60-68) and "has left no room for the King-Thompson Act." They rely on (1) Senate rejection of the Holland amendment, which would have given express authority to the States to regulate, qualify or prohibit strikes by employees of public utilities and (2) the adoption of an amendment to the Taft-Hartley Act which dealt with federal-state jurisdiction and ceded complete jurisdiction to the States in certain instances but which did not treat the issue here, where there is concurrent jurisdiction over the industry involved.

The amendment to Taft-Hartley was contained in Section 701 (a), Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257. The adoption by Congress of this amendment in which, in the words of Senator Carroll (105 Cong. Rec. 16416) "for the first time—we begin to *soften* the so-called doctrine of pre-emption," cannot reasonably be the occasion for claiming that all pre-emption decisions not touched by Congress were automatically

reaffirmed, and all pre-emption questions not treated were ruled in favor of federal control.

With respect to the Holland amendment, a reading of appellants' argument on this point would lead to the impression that an overwhelming majority of Senators have indicated their preference for letting the collective bargaining process in public utilities develop into "a brute contest of economic power," even though this may be accompanied by widespread public inconvenience and suffering, rather than allowing local authorities to adopt regulatory measures to avoid a local emergency. Examination of the Congressional debates shows, on the contrary, that not a single Senator took such a position.

It is true that various proposals have been made (principally by Senator Holland of Florida) for "clarification" of the right of local authorities to deal with local emergencies which frequently accompany strikes in public utilities, and it is also true that legislation providing such clarification has not been enacted by Congress. Appellants indicate that legislative proposals on this subject have been defeated on roll-call votes in the Senate on three occasions, in 1954, 1958 and 1959. In 1954, the proposal affecting public utilities was part of a general proposed revision of the Taft-Hartley Act, and was not voted on separately. The decisive bloc of votes was cast by twenty Southern Senators, who defeated the amendments. Senator Holland explained his regret that he must vote against the proposals, because they were open to "Fair Employment" amendments. 100 Cong. Rec. 6202. Omitting consideration of the Southern votes, the amendments commanded support from a plurality of the Senators. The 1954 vote cannot fairly be considered as a rejection of local control over local emergencies caused by labor-management strife.

Nor can the 1958 and 1959 defeats of the Holland amendment be used to show Congressional intent to close this field to local regulation. A reading of the debates on June 13, 1958, and April 25, 1959 (104 Cong. Rec. 11090-11101, 105 Cong. Rec. 6733-6740), discloses that most of the participating Senators who voted against the amendment favored it in principle. The only Senator indicating definite opposition to the proposal in 1958 was Senator Morse. He stated opposition to the proposal "in its present form * * * I have deep convictions about compulsory arbitration and the dangers it will lead to in the country. I think there are alternative procedures for handling public utility strikes that are preferable to those which the Senator from Florida has offered." (l.c. 11097). Thus, the emergency-seizure technique used in Missouri was not the special target of Senator Morse's opposition and not one of the Senators may be counted as an advocate of "letting the strike take its course," which appellants say is the result of the present law.

The position of Senator John F. Kennedy, as expressed in 1959, is of particular interest. The then-Senator from Massachusetts "reluctantly" opposed the Holland amendment (105 Cong. Rec. 6740). Searching his words on that occasion shows that he favored treating the problem in a separate bill, raised the question of compulsory arbitration, favored the retention of the right to strike when there is no true emergency, and indicated there was no urgent need for legislation because (in true emergency or public jeopardy situations) "the courts have the power to act in cases in which the health, safety and basic welfare of the citizens of the State are at stake. The courts have been given by the States the power to seize industries to protect the public health and safety." (l.c. 6740).

Senator Kennedy apparently had in mind, and assumed the partial or complete validity of, the statute of his native State, which has seizure provisions, but is restricted to prevention of a dangerous curtailment in the supply of essential goods and services, such as gas and electric light and power. Chapter 150B, Section 1-8, Ann. Laws of Mass., enacted in 1947 and amended in 1954. The Massachusetts statute is one of those threatened by this litigation (Appellants' Brief, page 50, note 9).

If Senator Kennedy was right, the principle of King-Thompson is sound, and safe from claims like appellants', that Federal law pre-empts the field. Of significance in this case, however, is Senator Kennedy's caveat relating to emergencies. He stated that a transit strike "is an inconvenience; but every strike involves inconvenience" (l.c. 6740). Thus, the main danger of pre-emption in this case arises from invoking the law in order to protect the public from the widespread inconvenience of a transit strike.

On the broad issue presented by appellants, however, the validity of State restrictions on strikes by public utility employees which create local emergencies, it appears that Congress has not "ratified" a supposed rule prohibiting such restrictions, but on the contrary not a single participant in Congressional debate defended the "public be damned" attitude which appellants would read into the failure of the Holland amendment.

C. The Amalgamated Decision Should Be Overturned If It Necessarily Invalidates the King-Thompson Act.

Argument has heretofore been made that appellants are urging a wholly unwarranted extension of the *Amalgamated* decision, which would cripple local authorities in the exercise of the police power, in a manner which is not

required by federal legislation and would in fact upset the division of state-federal responsibility in the labor field. If, however, there are members of the Court who have difficulty squaring the King-Thompson Act, as applied in this case, with the *Amalgamated* decision, then it is respectfully urged that the principles announced in the *Amalgamated* decision should be reconsidered and overturned in the light of further experience and additional guides to Congressional intent.

In the *Amalgamated* decision, and particularly in footnote 21, the majority of the Court inferred that the sponsors of the Taft-Hartley Act, notably Senator Taft, were seeking to assure a federally-protected right to strike in public utilities, and were not merely by-passing this question as a matter of federal law, thus leaving the States free to regulate labor disputes of essentially local concern, consistently with the federal scheme. The dissenting opinion in *Amalgamated* refused to accept this interpretation of Senator Taft's comments (l.c. 403-404), and it can now be determined that the minority opinion correctly viewed the legislative intent of Taft-Hartley's sponsors.

Professor Paul R. Hays of Columbia University, in an article entitled "Federalism and Labor Relations in the United States," 102 Univ. of Pa. L. Rev. 959 (1954), concluded that the legislative history of the Wagner and Taft-Hartley Acts might be summarized as follows (l.c. 965-966):

> "If congressional 'intent' concerning state regulation of labor relations may be derived not only from the express comments on particular aspects of the problem but also from the attitude of Congressmen in general, then the legislative history of the two acts taken as a whole and the comments of the senators at the 1953 hearing on proposed amendments support the contention that Congress intended to supplement state regulations rather than to displace it. For example,

> Mr. Hartley said (in 1947), in answer to a question about the effect of the federal act on Wisconsin Law: '. . . this will not interfere with the State of Wisconsin in the administration of its own laws.' (citation). Senator Taft said (in 1953): 'I may say that we never intended any pre-emption of the field. The Supreme Court has gone beyond what we intend.' (citation). 'In general, I am quite willing to leave to the states the control of anything that we can do.' (citation). 'Of course, I do not offhand see why the states cannot handle a local public utilities strike, a street car strike, or anything else, as well, as the Federal Government.' (citation)."

Professor Hays continued (l.c. 968):

> "The Court has held that, where the Congress chose to regulate strikes which create a national emergency, its rejection of proposed legislation which would have regulated local emergencies as well indicates an intention that local emergencies should be 'unregulated.' (citation of *Amalgamated* case). It seems much more likely that Congress 'intended' to leave such regulation to the states."

Likewise, Professor Bernard D. Meltzer of The University of Chicago, in an article entitled "The Supreme Court, Congress and State Jurisdiction Over Labor Relations," Special Supplement, The University of Chicago Law School Record (1958), 95, suggested (l.c. 98) that in the *Amalgamated* decision "an abstract formula became controlling despite the fact that such a formula could not be supported in terms of either a plainly expressed legislative purpose or the consequences produced in concrete situations." Professor Meltzer compared "the Court's sanction of state power over 'violence' on the picket line" with its apparent "denial of state power to maintain the flow of essential services," and commented (l.c. 98):

"Plainly, a breakdown in such services could enormously increase and complicate the problem of preserving order. Furthermore, such a breakdown posed at least as serious a problem for local authorities as a breach in the etiquette of picketing."

Finally, in the debates on the Holland amendment, Senator Holland reported (104 Cong. Rec. 9984), that Senator Taft "made no secret of his complete disagreement with the majority opinion" in the *Amalgamated* case, which relied heavily upon the supposed support of the principal sponsor of the Taft-Hartley Act.

It is submitted that adherence to the doctrine of *stare decisis* would require a finding that the issues which appellants seek to litigate in this appeal have become moot. If, however, the Court should find occasion to reach the merits of this case, contrary to its practice heretofore discussed, and if the Court should also conclude that the current validity of the *Amalgamated* principle is decisive, it is respectfully submitted that the Court should then depart from precedent on the substantive, as the procedural, question, and should abandon the *Amalgamated* decision, in the light of experience and additional guides to legislative intent.

III. Any Reversal of the Judgment Below Should Be Cautiously Stated, So As Not to Endanger Application of the King-Thompson Act to Basic Public Utilities, Whose Breakdown of Service Would Create Undisputed Local Emergencies and Disaster Situations.

Three members of this Court, in *Local 8-6*, dissented from the finding of mootness and expressed the view that the decision of the Missouri Supreme Court should be reversed "on the merits" (361 U.S. 363, 372). While amicus

believes that the dissenting members of the Court may now accept the Court's conclusion that cases such as this are moot. once the restraint on employees has been rendered inoperative, it recognizes that if the merits should be reached, there remains a possibility of a reversal. Such a result, though quite unsound in the opinion of amicus, would not create grave problems for local communities and for basic public utilities (those treated in the Massachusetts statute) if the Court should follow the well-established practice "not to formulate a rule of constitutional law broader than is required by the precise facts presented in the record." *Garner* v. *State of Louisiana*, 368 U.S. 157, 163.

This case is an appeal from an injunction saving the community of Kansas City from widespread public inconvenience and jeopardy occasioned by a transit strike. Whether the imminent threat of such widespread work stoppage poses a local emergency is arguable. The Governor of Missouri, basing his judgment on the opinion of the Missouri Supreme Court and his information regarding local conditions in Kansas City, terminated seizure and gave appellants the opportunity to strike. The Mayor and City Counselor of Kansas City thereafter sought to require a new seizure of the industry, on the theory that a transit strike would create an emergency under mid-winter weather conditions existing at the time seizure ended. There has, however, been no resumption of State operation of the transit system.

As has been noted, Senator Holland and Senator John F. Kennedy disagreed over whether an "emergency" had been created by a lengthy transit strike in Florida. Senator Kennedy treated such strikes as merely matters of "inconvenience." 105 Cong. Rec. 6740. If this Court should conclude that a transit strike does not create a true emer-

gency for local officials, then the public interest in labor relations in the local transit system would perhaps not qualify as an interest "deeply rooted in local feeling and responsibility," which is the test for avoidance of pre-emption, as stated in *Garmon, supra.*

In reaching the merits of this case, there should properly be a withholding of any observations extending beyond the general subject of transit strikes, and thereby the Court would avoid unnecessarily judging cases in public utility industries not now before the Court. (Certainly the Court would not wish to volunteer statements which would invite a disastrous collapse of gas or electric services in Kansas City or St. Louis, resulting from an unresolved labor-management dispute.) Since there is no reason to go beyond the record in this case, and to comment unnecessarily on the validity of the King-Thompson Act, in its application to basic public utilities in Missouri, and since such comment would be contrary to the established practice of this Court, as recently expressed in *Garner, supra*, amicus respectfully submits that the wise practice so stated should be followed in this case.

Apart from the pre-emption issue, appellants rely on the "right to strike," which they assert under the Thirteenth and Fourteenth Amendments. Even here, a distinction is possible between industries. A completely effective transit strike, closing down public conveyances, is conceivable and not infrequent in this country, while local toleration of an extensive breakdown in the services of basic public utilities is nearly inconceivable. Where the full exercise of an asserted "right" is nearly inconceivable, its constitutional sanctity can hardly be seriously urged.

Assuming, however, that the "right to strike" argument has some bearing on the validity of the seizure and

injunction provisions of the act, as applied to the business of amicus, brief response may be appropriate. Appellants assert that utility employees in Missouri are "crippled" by the act and cannot obtain "satisfactory terms" from their employers, who are in a position to "dictate" the terms and conditions of employment (Brief, page 70); and appellants advise the Court that "economic servility" results (Brief, pages 72, 74). These strong words are unsupported by statistics showing the supposed substandard conditions of utility workers in Missouri, arising during the decade and a half in which they have been "enslaved" by this legislation.

In making their argument, appellants ignore significant economic factors such as the profitableness to the employer of a strike in gas and electric companies, when all wages cease yet a breakdown of service is avoided, and they forget the ability of utility companies to pass on wage increases to the ultimate consumers, through rate increases obtained from regulatory agencies. The legislature might conclude that protection of consumer interests requires legislation of this type, so that management will not yield too easily to inflationary demands, backed by the threat of economic coercion.

As a concluding argument, amicus submits that a broadly phrased decision, declaring the invalidity of all seizure-injunction laws throughout the country, whether in the transit industry or in more basic public utilities, would do violence to important considerations which have long prevailed in this Court. Such a result would contravene the classic statement of Mr. Justice Brandeis in his dissent in *New State Ice Co.* v. *Liebman*, 285 U.S. 262, 311:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right

to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."

Today and in this case the threatened "closing of the laboratories" comes, not from the forging of private political and economic views into constitutional principles, under the auspices of the Fourteenth Amendment, but from the suggested use of the Supremacy Clause to work an unintended result from the efforts to amend the Wagner Act in 1947.

Those efforts culminated in a statute which is probably the major legislative accomplishment of the Eightieth Congress and of Senator Robert A. Taft. Giving that statute a judicial application whereby its greatest practical consequence is in disabling the States in labor relations, even when the local interest far exceeds that involved in the "etiquette of picketing," would seem to be less an exercise in statutory construction than a dramatic illustration of the theme that man's best laid plans "gang aft agley."

The expansion of pre-emption's "no man's land" so as to encompass public utilities essential to community life would perhaps jolt Congress into taking action—but it is submitted that pre-emption need not be converted from a difficult doctrine into a monstrosity, and the forcing of Congressional hands would not necessarily result in legis-

lation superior in quality to that which has been devised in Missouri, Massachusetts or Virginia.

CONCLUSION.

Amicus curiae respectfully submits that this cause is and should be declared moot. If the Court should reach the merits, however, it is respectfully submitted that the judgment below should be affirmed. In the event, however, that a majority of the Court should determine that the judgment below should be reversed on the merits, it is respectfully submitted that the opinion and ruling of the Court should be expresly confined to the precise facts presented in the record, which relate to an injunction against striking in the public transit industry.

Respectfully submitted,

.....,

IRVIN FANE,

.....,

HARRY L. BROWNE,

.....,

HOWARD F. SACHS,

Attorneys for Amicus Curiae.

April, 1963.

APPENDIX.

Article appearing in *The Kansas City News-Press*, March 8, 1963.

Transit Tie Could Come "Any Time"

Union Official Says Strike Call May Be Nearing

Loren Hargus Says Negotiations Are Still Stalemated

Loren Hargus, head of the transit workers union here, told The News-Press this week that a strike against Kansas City Transit, Inc., hanging fire for many weeks, could come at any time.

Hargus and other officials of the Amalgamated Association of Street Electric Railway & Motor Coach Employees of America met Monday before a federal mediator with officials of the transit company. Hargus said that no progress was made and the meeting was adjourned subject to the mediator's call.

"We have not been able to get the company to get serious about trying to negotiate a settlement," Hargus said. "I don't know how long we'll be able to extend our patience."

Hargus said that the union's executive board is authorized to call the city's bus drivers out on strike and indicated that the time may be drawing near for the board to act.

The union official said that his organization was interested in several pending court actions relative to the labor dispute. ONE, he said, would allow the transit company to sell out. This is opposed not only by his union but the city, Hargus said.

Hargus termed this an attempt by the company to "get out from under—get out of town."

A sudden strike by the transit workers would leave the city without any facilities for mass public transportation.